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that the defence had every latitude permitted to them. It is, however, to be observed that the final determination of this clear case has taken eighteen months from its commencement.

BY THE COURT:—The appeal is allowed, the order of acquittal passed by the learned Additional Session Judge is set aside and the conviction recorded by the magistrate is restored, along with the sentences of imprisonment and fine passed by him against Yakub Ali, Wazir Ahmad and Sheo Sahai.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EJAZ AHMAD AND ANOTHER (APPLICANTS) v. KHATUN BEGAM
(OPPOSITE PARTY.) *

Muhammadian law—Waqf—Minor mutawalli—Jurisdiction of court to appoint guardian in respect of waqf property—Act No. VIII of 1890 (Guardians and Wards Act.)

A Muhammadan died, leaving two sons and a daughter, all minors, and having also constituted a waqf of a partly public and partly private character, under which, upon the death of the waqif, one or other of his sons was to be *mutawalli*.

Held that it was competent to the District Judge to appoint a person to perform the duties of the *mutawalli*, pending either the coming of age of the minors or the institution of a regular suit by some persons interested in the endowment to contest the arrangement made by him.

THE facts of this case were as follows:—

One Huzur Ahmad died, leaving three minor children, two boys and a girl. Under the provisions of the Guardians and Wards Act, 1890, the District Judge of Budaun appointed Huzur Ahmad's own brother Ejaz Ahmad to be guardian of the property of the minors. Huzur Ahmad also constituted a waqf partly of a public and partly of a private nature, under which it was provided that he himself should be the first *mutawalli* and after him one or other of his sons. With regard to this the District Judge made a further order appointing Ejaz Ahmad to be the "*mutawalli* of the waqf property during the minority of the sons of Huzur Ahmad." Against both the orders mentioned above

* First Appeal No. 131 of 1916, from an order of F. D. Simpson, District Judge of Budaun, dated the 29th of March, 1916.

appeals were preferred to the High Court by the opposite party Khatun Begam.

Mr. *Abdul Raof*, for the appellant.

Mr. *S. M. Yusuf Hasan*, for the respondents.

PIGGOTT, J.—These are two connected appeals from orders passed by the District Judge of Budaun in connection with certain proceedings under the Guardians and Wards Act. By the first of these orders one Ejaz Ahmad was appointed the guardian of the property of three minors, two boys and a girl, children of his own brother, Huzur Ahmad. In so far as the petition of appeal before us is not connected with the other order presently to be considered, it amounts in effect to nothing more than this, that Ejaz Ahmad was not a suitable person to hold the guardianship of the property of these minors. If the record be examined from this point of view, it seems fairly clear from the evidence that no more suitable person for the guardianship of the property of the minors could have been found than Ejaz Ahmad. The appeal is complicated by being connected with the other appeal now before us, which is against a further order passed by the District Judge under the following circumstances. In Ejaz Ahmad's application to be appointed as the guardian of the property of these minors there was a specification of certain immovable property as the property of these minors. This consisted principally of undivided shares in a number of villages. It came out in the course of the inquiry that the whole of this property was waqf property under the Muhammadan Law, that is to say, it had been made the subject-matter of a waqf or endowment of a *semi-public* and *semi-private* character, of the kind legalized, if not previously lawful, by a recent Act of the Legislature on the subject of Muhammadan endowments. Under the terms of this trust one-third of the income of the property was to be distributed for the benefit of the poor, and the remaining two-thirds were to be applied for the maintenance and support of Huzur Ahmad and his children after him. Huzur Ahmad was appointed the first *mutawalli* or trustee of the endowment. There was a provision that after his death he would be succeeded in the trusteeship by one or other of his sons; and a further provision was made passing the succession to the brothers of Huzur Ahmad, in the event of the sons not being

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found suitable for appointment. The District Judge relied upon the authority of Mr. Ameer Ali's book on Muhammadan Law (*vide* Vol. I, page 445), and has held that the office of *mutawalli* in this case must have devolved on one or other of the minor boys in respect of whom the guardianship application was made. Consequently, according to Mr. Ameer Ali, the *mutawalliship* itself was in abeyance, but it was the duty of the Civil Court, as representing the authority of the State, formerly administered by the *Qazi*, to appoint some person to perform the duties of the office until the minors come of age. Purporting to act under this authority, the District Judge has appointed Ejaz Ahmad, as he puts it, "to be the *mutawalli* of the waqf property during the minority of the sons of Huzur Ahmad." He has in effect done what Mr. Ameer Ali lays down as the duty of the court in such a case. Now it is contended before us, in respect of both the orders passed by the District Judge, that there can be no guardian appointed of the property of a minor in such a manner as to give the guardian any control over waqf property. The first point taken is that the waqf property does not belong to the minors, but to the Almighty, and that there can only be a trustee or *mutawalli* to hold charge of the property, so that the question of the appointment of such trustee lies wholly outside the scope of the Guardians and Wards Act. So far as this point goes, the contention seems open to an obvious answer. It may be that the case of a Muhammadan endowment constituted in accordance with the authority recognized by the new Statute of the Legislature, will bring before the notice of the courts a number of delicate points for legal determination. This much, however, is clear, that endowments, such as are now in question, are partly private trusts and partly religious or charitable endowments. Now the minors are persons interested in this trust. They are the principal persons for whose benefit the trust now exists. The immovable property itself, the subject-matter of the trust, does not belong to the minors, but the property of the minors consists of their interest in the said trust, that is to say, the benefits which they are entitled to receive under the same. There seems no reason whatever for holding that a guardian of the property of the minors cannot be appointed in respect of their interests under the trust, in order that these interests may be

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protected and the benefits thereof secured for the minors. The further point raised is a somewhat more difficult one. It is contended that, whatever might be the authority of the District Judge of Budaun in the matter of dealing with this endowment, that authority was not called into requisition by the proceeding under the Guardians and Wards Act which was pending before him. The contention is that there should have been a regular suit, either under the provisions of section 92 of the Code of Civil Procedure, or under those of order I, rule 8, clause (e), of the same Code, or under the Religious Endowments Act, No. XX of 1863. I do not think that for the purpose of disposing of the appeal now before us it is necessary to lay down principles of law generally applicable to the question of Muhammadan endowments, or to the particular species of Muhammadan endowments with which we are now concerned. The position taken up by the District Judge is that the interests of the minors in this trust require to be protected, and that it is necessary to put the guardian of their property in a position to do this. It has been shown to us that the person actually managing the property is the *lambardar* of the various *mahals* in which the undivided shares forming the trust property are situated. Indeed a point was made before us on behalf of the appellant, to the effect that the Revenue Court has refused to appoint Ejaz Ahmad *lambardar* of these *mahals*. There does not seem to be anything favourable to the appellant in this circumstance. The duty of the guardian of the property of these minors, or of the manager of this endowment, will be to see that the *lambardar* does not appropriate to himself the profits of these shares, but that he duly accounts for and pays them over to some responsible person, in order that they may be applied for the purposes of the trust. Now, according to the principle laid down by Mr. Ameer Ali, the *mutawalliship* of this trust is at present in abeyance, but according to the terms of the trust deed, it should eventually devolve on one of the minors in respect of whom the guardianship application is made. Under these peculiar circumstances, it seems to me that the District Judge was so far seized of the question, that he was entitled to pass orders for the performance of the duties of the *mutawalli*, pending, either the coming of age of the minors, or the institution of a regular suit by

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some person or persons interested in the endowment to contest the arrangement made by him. In this view of the matter, the orders by the District Judge in this case seem to me appropriate and within his jurisdiction. He had before him all the parties directly interested in the administration of the trust in so far as that trust is of a private and not of a public character. They had opportunity of laying their case before him, and for the purpose of the proceedings in issue I think the order passed was within the competence of the court. I would therefore dismiss both the appeals with costs.

WALSH, J.—I agree. The substantial result is clearly in the interests of the *cestui que trustent*, and of the minors, for they are both. Indeed it is not seriously disputed on that ground. Properly regarded, the application and the order made upon it was merely one under the Guardians and Wards Act, and it is a mere accident that to complete the order of the court and to make it really workable in the interests of the minors it was necessary to make the appointment of a *mutawalli*. Mr. *Abdul Raoof* is asking us to do just what the lower court could not do, namely, to interfere by direct action with the management and charge of this trust. It seems to me that if his client wanted to raise this question it was her business to do so by an ordinary suit, under the Code of Civil Procedure, or under the provisions of Act XX of 1863. Then of course the validity of this order *qua* the appointment of a *mutawalli* might be called in question and it might be that the court would come to a conclusion that some other person ought to be appointed as such *mutawalli*. In that case the present appointment of *mutawalli* would lapse, and the guardian's duty would be to see that the *mutawalli* newly appointed carried out his duty so far as the trust in favour of the minors is concerned. But if Mr. *Raoof's* argument prevailed the matter would be left in this unsatisfactory position, that the court having appointed a guardian for the minors' interests, the guardian would have no power to protect the interests of those minors.

Appeal dismissed.